

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALFREDO JUAREZ)	
Claimant)	
VS.)	
)	Docket No. 242,177
ROCK CONSTRUCTION COMPANY)	
Respondent, Uninsured)	
AND)	
)	
PREMIER REALTY)	
Respondent)	
)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent Premier Realty and its insurance carrier, Continental Western Insurance Company, appeal from a June 8, 1999 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant filed a form K-WC E-1 Application for Hearing on March 5, 1999 alleging a series of accidents beginning "12/15/98 and each and every day thereafter up to 2/19/99." The employer was listed as Rock Construction Company. No insurance carrier was identified and it appears Rock Construction Company was uninsured.

On March 15, 1999 an Amended Application for Hearing was filed adding Premier Realty as another employer. The insurance carrier for Premier Realty is Continental Western Insurance Company.

On June 8, 1999 a preliminary hearing was held on claimant's request for medical treatment. The ALJ found claimant was injured while working for Rock Construction on December 15, 1998. As Rock Construction was found to be an uninsured subcontractor of Premier Realty, all benefits were ordered paid by Premier Realty and its insurance

carrier, Continental Western Insurance Company.¹ The ALJ ordered the payment of temporary total disability compensation and past medical expenses and authorized Eustaquio Abay, M.D., as claimant's treating physician.

Respondent Premier Realty and its insurance carrier petitioned for review of the ALJ's Order raising the following issues:

1. Whether claimant gave proper notice.²
2. Whether claimant was an employee of Rock Construction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the preliminary hearing, counsel for both respondents denied claimant met with a work-related injury. Notice was also identified as an issue at the outset of that hearing. Alfredo Juarez testified that he was hired by Alvaro Arevalo who did business as Rock Construction. Claimant worked as a drywall finisher. On December 15, 1998 claimant was working on stilts applying mud to a ceiling when he stepped in sheetrocking mud, slipped and fell backward to the ground. Soon afterwards claimant's employer, Mr. Arevalo, appeared saying he had heard claimant fall and asked claimant if he was alright. Mr. Arevalo also asked claimant what happened, did he fall and claimant answered yes.

Claimant continued working his normal job duties until sometime in February but with worsening back and left leg pain. Claimant informed his employer, Mr. Arevalo, about his symptoms. At that time claimant did not ask for medical treatment but sought treatment on his own. Eventually the pain got to the point where he could no longer continue working. Claimant told Mr. Arevalo that he could not work anymore because of the pain.

Claimant testified that the first time he advised his employer that his back was bothering him was after he saw the doctor in January 1999. Claimant also testified that he could not remember whether it was before or after he saw the doctor that he informed his employer about his leg pain. Claimant was referred by Dr. Hector Fernandez to Dr. Abay who ordered an MRI and recommended surgery.

When Mr. Arevalo first questioned claimant after the fall, claimant denied being injured. It was not until several days later, perhaps 12, that claimant started experiencing pain down his leg. Claimant informed his employer about his leg pain but he did not initially relate it to the fall nor did he say that it was from work. Claimant said at that time he did

¹ See K.S.A. 1998 Supp. 44-503.

² K.S.A. 44-520.

not know what was causing his leg pain and therefore decided to seek treatment on his own.

Alvaro Arevalo also testified at the preliminary hearing. Mr. Arevalo did not recall the December 15, 1998 accident and testified he did not think he was working with claimant on that date. He said claimant first described leg pain but denied it was work related. It was sometime after claimant started receiving treatment that he first mentioned back symptoms. According to Mr. Arevalo, it was not until after claimant had already quit working somewhere around February or March before he mentioned his back and leg problems were related to work. Mr. Arevalo recalled a conversation where he asked claimant how he may have injured his leg and claimant answered "maybe picking up a bucket or something heavy." According to Mr. Arevalo, this was the only conversation where claimant indicated a causal relationship with work but again claimant was uncertain about any specific accident being the cause of his injury. Mr. Arevalo also denied claimant was his employee arguing instead that claimant was an independent contractor. He paid claimant by the square foot, did not withhold taxes and denied that he supervised claimant's work. But Mr. Arevalo admitted that he obtained all the jobs that claimant worked and provided all the materials that claimant used.

The ALJ found a single accident date of December 15, 1998 and that respondent had notice of that accident. The Appeals Board agrees with the finding of timely notice but does so for a different reason. The Board finds claimant has proven his condition worsened by a series of accidents each and every working day thereafter. The best estimate of claimant's last day worked is February 19, 1999 and this is held to be the date of accident.³

The ALJ found that Rock Construction Company was a subcontractor of Premier Realty and, under K.S.A. 1998 Supp. 44-503, Premier Realty was the principal. The Board agrees and further finds that claimant was an employee of Rock Construction. Claimant testified he was hired in October 1998 by Mr. Arevalo to work with a drywall crew for Rock Construction. All materials and tools were furnished by Rock Construction. All the work came from and all job assignments were made by Rock Construction. Claimant did not work alone. Rather claimant worked as part of a crew of workers each of whom was hired by Rock Construction. Claimant did not select or hire his co-workers. He did not supervise or control his co-workers. Mr. Arevalo did. Mr. Arevalo told him where to work, who to work with and Mr. Arevalo was often present at the jobsite working alongside claimant. Mr. Arevalo told claimant what time to be at work and what time to stop working. This is all consistent with an employer/employee relationship.

³ See, Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999) and Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark, dated June 8, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

c: Gerard C. Scott, Wichita, KS
Joseph Seiwert, Wichita, KS
James B. Biggs, Topeka, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director